No. 10925

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

F. C. MOSER,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

DECISION BELOW

After requiring appellant (plaintiff below) to serve and file a bill of particulars (R. 33) the court granted the motion of appellee (defendant below) to dismiss appellant's action (R. 16) and entered an order or judgment dismissing the same (R. 80).

This dismissal was not based solely upon the ground that appellant's action was barred by the statute of limitations and laches, as seems to be the view of appellant (appellant's brief 3). The dismissal, as shown by the order (R. 80), was upon all the grounds stated in the motion to dismiss, namely, that in the complaint plaintiff (appellant) failed to state a claim upon which relief could be granted because (1) plaintiff

failed to allege facts sufficient to state such a claim, and (2) it appears affirmatively from the allegations thereof that the action alleged, if any, was barred by the statute of limitations of the State of Washington and by laches on the part of plaintiff.

STATEMENT OF THE CASE

It is believed that an analysis of the allegations of the complaint, as supplemented by the bill of particulars, which became a part thereof pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, will be of aid to the court in its consideration of the position of appellee and the decision of the District Court.

In the complaint (Par. III, R. 24) it is alleged that during the period from October 7, 1907, to and including August 22, 1936, plaintiff was "a special agent of the defendant corporation for the purpose of canvassing for applications for life insurance and annuities and performing such other duties as might be required of him by the terms of his contract of employment with the defendant corporation consisting of agency agreements and Nylic."

It is alleged (Par. IV, R. 24) that on or about January 1, 1908, plaintiff entered into a contract with the defendant "wherein the plaintiff was to employ his full time as a soliciting life insurance agent for the defendant, which agreement provided for compensation to the plaintiff of nine (9) renewals of five (5) per cent each, or a total renewal commission of forty-five (45) per cent."

This agreement is annexed to plaintiff's bill of particulars as Exhibit A (R. 37-46).

Under this agreement on policies of life insurance issued by defendant on applications secured by plaintiff, he would receive as a renewal commission five (5) per cent of the annual premium paid by the policy holder during the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth years that the policy remained in force (R. 44, 45).

It was alleged (Par. V, R. 24, 25) that during the year 1910 defendant established for its life insurance soliciting agents a "dual agency system" consisting of "Nylic" and a single agency agreement; that "Nylic" is a system which embraces two periods, the first period of twenty (20) years designated by the defendant as the "Qualifying Nylic Period" and the lifetime period thereafter designated by the defendant as the "Senior Nylic Period."

It was charged (Par. VI, R. 25, 35) that during 1910 defendant represented to plaintiff that under the defendant's alleged "dual agency system" the compensation which plaintiff would receive as *renewal commissions* on policies of life insurance issued on applications procured by plaintiff and as Nylic payments, *during plaintiff's qualifying Nylic period of 17 years, expiring January 1, 1928*, would be the "equal of forty-five (45) per cent in renewals provided for in the said agreement dated January 1, 1908," which is Plaintiff's Exhibit A.

From the bill of particulars it appears that all of the said representations were oral. None of them was in writing (R. 34). The latest date upon which any of the alleged oral representations was made was in the year 1910 (R. 35).

It was alleged (Par. VII, R. 25) that relying upon said representations plaintiff surrendered said contract dated January 1, 1908, and signed and accepted an agency agreement dated August 17, 1910, and a "Nylic" contract, "both to become simultaneously effective on January 1, 1911."

The said agency agreement of August 17, 1910, is a part of plaintiff's bill of particulars and is annexed thereto as plaintiff's Exhibit C (R. 69).

The alleged "Nylic" contract is a part of plaintiff's bill of particulars and is annexed thereto as plaintiff's Exhibit B (R. 47).

It was charged (Par. VIII, R. 26) that during the period of 17 years ending January 1, 1928, plaintiff served as agent of defendant "relying upon the said defendant's representations as to the amount of compensation to be paid plaintiff by the defendant thereunder."

Plaintiff then alleged (Par. IX, R. 26) "that said representations were false and fraudulent in that the plaintiff actually received during said period (January 1, 1911 to January 1, 1928) from the defendant under said dual agency system $52,171.45 in renewal commissions and $56,498.95 in 'Nylic' payments, or a total dual agency payment of $108,709.82;" that if plaintiff had received during said period renewal commissions computed in accordance with the provisions of the single agency agreement of January 1, 1908 (plaintiff's Exhibit A) plaintiff would have been paid $156,514.35 "in renewal commissions;" and that "by reason of the premises defendant has wrongfully de-

frauded plaintiff out of the sum of $47,804.53," for which amount, with interest at the legal rate, plaintiff seeks judgment against defendant.

It appears from the bill of particulars that of the sum of $52,171.54 which plaintiff alleges (Par. IX) he received as renewal commissions pursuant to the agency agreement of August 17, 1910 (Exhibit C) plaintiff received $49,278.66 thereof prior to January 1, 1928, and $2892.86 after January 1, 1928, but prior to December 29, 1929 (R. 36).

It appears also from the bill of particulars that the entire sum of $56,498.95 which plaintiff alleges (Par. IX) he received as Nylic payments pursuant to the provisions of Nylic 2 (plaintiff's Exhibit B) was received by plaintiff prior to January 1, 1928 (R. 36).

Plaintiff charged (Par. X, R. 26) that the defendant "made all calculations, handled all funds and made all the payments on compensation that was due based on its own calculations; that the plaintiff reposed great confidence in the defendant and its methods of business and that a fiduciary relationship existed between the parties and that as a result of plaintiff's trust as to the manner of the operations of defendant plaintiff did not discover that said representations as to the amount of his compensation were falsely and fraudulently made to him, and that plaintiff did not discover that such representations were false and fraululent until within a period of at least a year from the date hereof." This obviously means the date upon which the complaint was subscribed and sworn to by plaintiff. This date is February 11, 1944 (R. 27).

Plaintiff's summons and complaint in this action

were served upon defendant on February 14, 1944 (R. 3).

In the agency agreement dated August 17, 1910 (plaintiff's Exhibit C, R. 69, 77) the renewal commissions payable to plaintiff during the 17-year period beginning January 1, 1911, and ending December 31, 1927, are specifically set forth.

Likewise, in Nylic 2 (plaintiff's Exhibit B; R. 47) the Nylic payments payable to plaintiff during the 17 year period commencing January 1, 1911 and ending December 31, 1927, are specifically set forth. These Nylic payments are in addition to the commissions payable to plaintiff under the agency agreement of August 17, 1910 (plaintiff's Exhibit C).

It also appears from an examination of Nylic 2 (plaintiff's Exhibit B) that in addition to the Nylic payments of $56,498.95 which plaintiff alleges (Par. IX, R. 26) he received during the period of 17 years commencing January 1, 1911, and ending January 1, 1928, plaintiff, by reason of attaining the degree of Senior Nylic, earned and was entitled to receive for life monthly payments, commencing January 1, 1928, computed in accordance with the formula set forth therein (R. 62, 63). Obviously, because of the large volume of business procured by plaintiff, these monthly income payments payable to plaintiff subsequent to December 31, 1927, are in a substantial amount.

In the agency agreement dated January 1, 1908 (plaintiff's Exhibit A, R. 37, 44, 45) the renewal commissions payable to plaintiff thereunder are specifically set forth.

As a summary of the facts which appear conclus-

ively from the allegations in the complaint, supplemented as they are by the bill of particulars, it is deemed appropriate to direct specific attention to the following facts:

(1) The alleged representations upon which plaintiff's action was predicated were made in 1910. None of them was in writing. All of them were oral.

(2) The sole charge is that defendant in 1910 orally represented that under the agency agreement dated August 17, 1910, and "Nylic 2" the aggregate amount which plaintiff would be entitled to receive as compensation for renewal commissions and Nylic payments during the 17 year period ending December 31, 1927, would equal the amount of the renewal commissions plaintiff would have been entitled to receive under the agency agreement dated January 1, 1908, if it were applicable throughout said 17 year period.

(3) There is no charge that at the time the alleged representations were made in 1910 defendant knew or could have known or had any reason to believe that plaintiff's renewal commissions plus Nylic payments to be made him during the said 17 year period ending December 31, 1927, could not and would not equal or exceed the amount of the renewal commissions that appellant would have received if the agency agreement of January 1, 1908, had not been surrendered and had been continued in force throughout said 17 year period.

(4) There is no charge that defendant made any false representation or even any representation of an existing fact. The oral representations alleged and relied upon by appellant, made in 1910, were in re-

spect of future renewal commissions and Nylic payments to be made during a period of 17 years ending December 31, 1927. Obviously, the amount of the renewal commissions which appellant would have received during the said 17 years if the amount thereof were computed in accordance with the provisions of the agency agreement of January 1, 1908, which was superseded by the agency agreement of August 17, 1910, could not possibly be predicted in 1910 by either appellant or appellee with any degree of accuracy. The amount would depend upon unknown factors, such, among others, as the volume and kind of business which would be produced by plaintiff, the number of years each policy issued on applications secured by plaintiff would remain in force, and the length of time plaintiff would remain in defendant's employ under the agreement of January 1, 1908. Plaintiff's knowledge in respect of these unknown factors and his capacity to evaluate them were the equal of the defendant's. Upon these same unknown factors would depend the amount of the renewal commissions and Nylic payments plaintiff would be entitled to receive under the agency agreement of August 17, 1910, and the "Nylic Contract." The latter amounts might or might not be equal to or greater than the former. Plaintiff's knowledge and capacity to evaluate these factors were also the equal of defendant's. There was no uncertainty, however, about the formula to be applied in the determination of the amount plaintiff would be entitled to receive under either of the agreements. In each of the written agreements the specific formula applicable is set forth. The computation of the amount, if one de-

sired to indulge in predictions, was nothing more than a mathematical computation in respect of which plaintiff was in no different position than was defendant. There was no charge that plaintiff was unable to read, write and subtract and multiply.

(5) There was no charge that defendant concealed from plaintiff any material fact of which defendant had knowledge. Nor is there any charge or suggestion that defendant failed to reveal all material facts of which it had knowledge.

(6) There are no facts alleged which if proved would establish that a fiduciary relationship existed between appellant and appellee, or would support appellant's alleged conclusion that "a fiduciary relationship existed between the parties." To the contrary, from the allegations in the complaint and from the agency agreements annexed to the bill of particulars it affirmatively appears that plaintiff was an agent of defendant, employed for the purpose of soliciting applications for life insurance and annuities. There is no allegation or suggestion that between the parties there was in 1910 or at any other time a professional relationship, a family tie, or anything which itself impels or induces a trusting party to relax the care and diligence which he otherwise could and ordinarily would exercise. It appears conclusively from the allegations of the complaint and from the bill of particulars that the relationship between the parties was nothing more than the usual and normal business relationship which exists between a life insurance company and any of its soliciting agents. There is not a single allegation of fact in the complaint which

suggests or would support a belief on the part of plaintiff that defendant at any time was undertaking to act for him or in his behalf.

(7) It appears affirmatively from the allegations of the complaint that plaintiff ceased to be an agent or an employee of defendant on August 22, 1936. Consequently, it affirmatively appears that any fiduciary relationship which might have existed (there was none in fact) terminated August 22, 1936, if it had not for the purposes of this case terminated on December 31, 1927.

(8) It appears affirmatively and conclusively that appellant knew during the years between January 1, 1911 and January 1, 1928, the exact amount of the renewal commissions and Nylic payments he was receiving from time to time; and that not later than December 29, 1929, appellant knew and since has known the exact amount which he had received from appellee as renewal commissions and Nylic payments during the 17-year period ending December 31, 1927.

(9) Appellant's action was not commenced until February 14, 1944.

(10) It appears conclusively from the allegations of the complaint that this is not an action for rescission.

(11) It also appears conclusively that this is not an action for a breach of the agency agreement of August 17, 1910, or of the alleged "Nylic 2" agreement. There is no charge that appellant was not paid renewal commissions and "Nylic" payments strictly in accordance with the provisions of said agreements.

SUMMARY OF ARGUMENT

There is a failure to state a claim upon which relief can be granted because basic and essential elements of a fraud action are not alleged, and it conclusively appears that there was no fraud.

Plaintiff's action was based solely upon oral representations of defendant which plaintiff alleged were false and fraudulent. The oral representations relied upon did not relate to an existing fact. They were and must reasonably be considered as a mere estimate or opinion as to something in the future. In addition, there are no facts alleged sufficient to support a charge that the representations were false, or that they were known by defendant to be false at the time plaintiff claims they were made. Nor is there any allegation of facts sufficient to support a charge that plaintiff was ignorant of their falsity. Nor are there any facts alleged to indicate that plaintiff had a right to rely upon the alleged oral representations.

To the contrary, it conclusively appears from the facts that there was no fraud. In 1910, at the time the alleged representations were made and at all times thereafter, plaintiff's information, knowledge and means of knowledge of all material facts and factors were as full and complete as were defendant's. There was no uncertainty or ambiguity about the specific formula set forth in each of the written agreements, to be applied in the computation of the amount of renewal commissions and Nylic payments to which plaintiff would be entitled. Plaintiff's ability to predict the events of the future and to evaluate the effect of such events in terms of the compensation

he would be entitled to receive under the applicable agreements was the equal of defendant's. At no time was there any concealment or misrepresentation of any material fact of which defendant had or could have had knowledge. There was no fraud.

Apart from all other considerations, there is a failure to state a claim upon which relief can be granted because it conclusively appears from the allegations of the complaint, supplemented by the bill of particulars, that plaintiff's action is barred by the statute of limitations and by laches on the part of plaintiff. The three-year statute of limitations is applicable. Plaintiff's action was not commenced until February 14, 1944, more than 33 years after the oral representations relied upon are alleged to have been made, more than 16 years after December 31, 1927, which is the end of the 17-year period here relevant, and approximately 7½ years after August 22, 1936, the date of the severance of plaintiff's employment by defendant.

Plaintiff knew from time to time during the 17-year period commencing January 1, 1911, the amount of the renewal commissions and Nylic payments he was paid in accordance with the agreements then applicable. Prior to December 30, 1929, plaintiff received all of the renewal commissions and Nylic payments he was entitled to receive under the applicable agreements. Throughout said period of 17 years ending December 31, 1927, and since, plaintiff at all times knew or could have ascertained by computations of his own, the amounts which he might have received

as renewal commissions if the agency agreement of January 1, 1908, were applicable during said period.

Under these facts which appear conclusively from the allegations of the complaint, as supplemented by the bill of particulars, appellant's action is barred by the statute of limitations because it was not commenced within three years after the cause of action, if any, accrued and within three years after discovery by appellant of the facts constituting the alleged fraud.

It also conclusively appears from the allegations of the complaint, as supplemented by the bill of particulars, that there was no fiduciary relationship between plaintiff and defendant, as asserted by plaintiff and that if there had been any such fiduciary relationship it terminated not later than August 22, 1936.

The points and authorities relied upon by plaintiff are not here applicable.

ARGUMENT

I.

There is a failure to state a claim upon which relief can be granted because basic and essential elements of a fraud action are not alleged, and it conclusively appears that there was no fraud.

Plaintiff's action was based solely upon alleged false and fraudulent oral representations of defendant. It was a fraud action. It is the position of appellee here, as it was in the District Court, that the basic and essential elements of a fraud action are not alleged, and that consequently there is a failure to state a claim upon which relief can be granted.

The essential and basic elements which must be alleged and proved to sustain a recovery in an action based upon fraud are stated in *Webster v. Romano Engineering Corp.*, 178 Wash. 118, 120, 34 P.(2d) 428, to be as follows:

> "* * * But what is fraud? This court has been reluctant to circumscribe it by definition. *Knutsen v. Alitak Fish Co.*, 176 Wash. 169, 28 P.(2d) 334; *American Savings Bank & Trust Co. v. Bremerton Gas Co.*, 99 Wash. 18, 168 Pac. 775. We have, however, along with all other courts, recognized certain essential elements that enter into its composition. These are: (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage. 26 C.J., p. 1062, Sec. 6 and 7; *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447; *Raser v. Moomaw*, 78 Wash. 653, 139 Pac. 622, 51 L.R.A. (N.S.) 707; *Hamilton v. Mihills*, 92 Wash. 675, 159 Pac. 887."

See, also:

> *Andrews v. Standard Lumber Co.*, 2 Wn. (2d) 294, 97 P.(2d) 1062.

General allegations of fraud, collusion or bad faith are insufficient in the absence of allegations of fact themselves giving rise to an inference of fraud.

> *Moore v. Tumwater Paper Mills Co.*, 181 Wash. 45, 55, 42 P.(2d) 29.

Representations which are a "*mere matter of opinion as to something in the future*" are not actionable.

Jewell v. Shell Oil Company, 172 Wash. 603, 609, 21 P.(2d) 243.

The characterization of acts as fraudulent which are not fraudulent *per se* is not sufficient. It must be made to appear by the facts alleged, independent of mere conclusions, that if the allegations are true a fraud has been committed.

Betz v. Tower Savings Bank, 185 Wash. 314, 322, 55 P.(2d) 338.

The rule is that fraud cannot be predicated upon statements promissory in their nature and relating to future actions, *nor upon the mere failure to perform a promise or an agreement to do something at a future time, or to make good subsequent conditions which have been assured.* Nor is non-performance alone evidence of fraud. In *Rankin v. Burnham*, 150 Wash. 615, 618, 274 Pac. 98, the reasons given for this rule are stated at page 618 as follows:

> "The general rule is that fraud can not be predicated upon statements promissory in their nature and relating to future actions, nor upon the mere failure to perform a promise, or an agreement to do something at a future time, or to make good subsequent conditions which have been assured. Nor, it is held, is such non-performance alone even evidence of fraud. Reasons given for this rule are that a mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform it does not change its character. Moreover, a representation that something will be done in the future, or a promise to do it, from its nature

> cannot be true or false at the time when it is made. The failure to make it good is merely a breach of contract, which must be enforced by an action on the contract, if at all. And as in the case of promises, it is generally held that mere assertions of intention, or declarations of future purpose, do not amount to fraud."

If the truth or falsity of the representation might have been tested by ordinary vigilance and attention, "it is the party's own folly if he neglected to do so." A party whose rights rest upon a written instrument which is plain and unambiguous and who has read or had the opportunity to read the instrument cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein.

> *Johnston v. Spokane & Inland Empire R. Co.*, 104 Wash. 562, 177 Pac. 810;
>
> *Kelley v. von Herberg*, 184 Wash. 165, 174, 50 P.(2d) 23;
>
> *Hubenthal v. Spokane & Inland Ry. Co.*, 43 Wash. 677, 685, 86 Pac. 955.

Here the first basic and required element of a fraud action is missing. The representations alleged did not relate to an existing fact. They were and must reasonably be considered as a mere estimate or opinion as to something in the future, a future covering a period of seventeen years subsequent to the date the representations are alleged to have been made. Fraud cannot be predicated upon such representations. We shall cite and quote from some of the applicable and controlling authorities.

The applicable rule is stated in *Webster v. Romano*

Engineering Corp., 178 Wash. 118, 121, 34 P.(2d) 428:

> "It is quite obvious, we think, that several of these elements are lacking in the representations relied upon in the instant case. We shall discuss, however, only the first — the basic element of an action for deceit. The representation must relate to an existing fact. Speaking of this point, in *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 305, 47 Pac. 738, we said:
>
> " 'It [the representation] did not relate to a *past transaction* nor was it the statement of an existing fact. It was a mere estimate of what they would do in the future, and fraud cannot be predicated upon it.'
>
> "See, also: *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, L.R.A. 1916B, 1069.
>
> "Measured by this standard, the representations relied upon by appellant cannot form the basis of an action for deceit. They are expressions of opinion about something to take place in the future, namely, what the grader would do under certain conditions. They relate neither to a past transaction nor to an existing fact."

The established rule here applicable is also stated in *Jewell v. Shell Oil Co.*, 172 Wash. 603, 609, 21 P.(2d) 243, as follows:

> "Upon the cause of action for fraud, which was withdrawn from the jury, little need be said. That cause of action was based upon claimed representations made to the respondent at the time he signed the lease that his profits, in addition to the four cents, would be a certain number of cents, and he claims that his profits were one-half cent per gallon less than it was repre-

> sented they would be, and by this cause of action seeks to recover two hundred fifty dollars. The statement as to what the respondent's margin of profit would be, if it were made, was a mere matter of opinion as to something in the future, and was not actionable. *Davis v. Masonic Protective Association*, 94 Wash. 406, 162 Pac. 516. Other cases might be cited, but the rule is so well settled as not to require the multiplication of authorities. The trial court correctly withdrew from the jury this cause of action."

In *Hanlon v. Nelson*, 140 Wash. 123, 125, 248 Pac. 59, the court stated and followed one of the established rules here applicable:

> "The other representation, made at the time the first tract was purchased, that the respondents had reserved the twenty-five-foot strip, amounted at the most to a promise that the respondents would, at some time, open or dedicate a street. *A promise as to something to be performed in the future, even though the promise is never fulfilled, is not fraud which entitles a party, though misled by the promise, to recover damages after having relied on it.*" (Italics ours)

See, also:

> *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 286, 47 Pac. 738;
>
> *Williamson v. United, etc. of Carpenters*, 12 Wn.(2d) 171, 184, 120 P.(2d) 833.

Here, also, other basic essential and required elements of a fraud action are missing. There are no facts alleged sufficient to support a charge that the representations which appellant claims he relied upon were false, or that same were known by the appellee

to be false at the time it is alleged that the representations were made. Nor are there allegations of facts sufficient to support a charge that appellant was ignorant of their falsity. Nor are there any facts alleged to indicate that appellant had a right to rely upon the representations.

To the contrary, from the facts alleged it conclusively appears that there was no fraud. Neither appellee nor appellant in 1910 knew or could have known with any degree of accuracy whether the renewal commissions and Nylic payments which appellant would be entitled to receive under the alleged agreements of August 17, 1910, during the seventeen-year period ending December 31, 1927, would be greater or less than the renewal commissions he might have been entitled to receive under the prior agreement of January 1, 1908. As previously pointed out it affirmatively appears from the allegations that all of the material facts known by appellee were known by appellant. His ability to predict the events of the future and to evaluate the effect of such events in terms of the compensation he would be entitled to receive was the equal of appellee's. There was no concealment or misrepresentation of any material fact of which appellee had or could have had knowledge.

Nor was there any uncertainty or ambiguity about the formulae to be used in the computation of appellant's compensation. The formulae for computing the amount of the renewal commissions which appellant might have been entitled to receive under the contract of January 1, 1908 (Exhibit "A") if it had not been terminated, and the amount of the renewal commis-

sions and "Nylic" payments which appellant would be entitled to receive during the seventeen-year period ending December 31, 1927, under the agency agreement of August 17, 1910 (Exhibit "C") and the so-called "Nylic Contract" (Exhibit "B"), are set forth in the respective agreements in plain and unambiguous terms. Appellant was as fully informed in respect of said formulae or percentages as was appellee. In 1910 there was no misunderstanding about such formulae, and in respect thereof there is no misunderstanding now. Nor is there any issue here in respect thereof. This action is not an action based upon a breach of either of said agreements.

Naturally, in 1910 the factors to which these formulae would apply during the subsequent seventeen-year period were speculative and variable. Before it would be possible to estimate or compute the amount of the payments which appellant would be entitled to receive under any of the agreements, the parties would need to know, among other items, (1) the number of policies which would be issued on applications secured by appellant, (2) the annual premiums provided for in each, (3) the amount of the life insurance represented by each policy, (4) the number of years each policy would be kept in force by annual payments of the premiums by the policy holder, and (5) the number of years the agency agreements or Nylic would remain in force during the seventeen-year period (by express provision in each of the agreements either party had the right to terminate same at will upon thirty days' written notice).

In respect of these variable factors appellant's

information and knowledge were equal to that of appellee. Appellant had all information which appellee had. Appellee's guess or opinion in 1910 about these unknown and variable factors could not possibly be of any greater accuracy or weight than the guess or opinion of appellant.

Consequently, it appears from the allegations in the complaint that appellant in 1910 knew as much about the variable factors to which the prescribed and known formulae were to be applied as did appellee. Moreover, appellant had actual knowledge and information equal to that of appellee in respect of the future possibilities and the compensation which appellant might be entitled to receive in the future under the agency agreement and Nylic contract, both dated August 17, 1910, as compared with the renewal commissions he might possibly have been entitled to receive if the agreement of January 1, 1908, were to remain effective until January 1, 1928.

It follows, we submit, that it appears from the allegations of the complaint that the following essential elements of a fraud action, among others, are here missing, namely: (1) a representation of an existing fact, (2) its falsity, (3) the speaker's knowledge of its falsity or ignorance of its truth, (4) ignorance of its falsity on the part of appellant, (5) appellant's reliance on the truth of the representation, and (6) appellant's right to rely upon it. Without allegations of facts which if proved would establish each of these essential elements, appellant fails to state a claim upon which relief can be granted.

It seems appropriate to specifically point out that

appellant here may not base an action for fraud upon a charge that he did not read the written contracts which are plain and unambiguous, or did not know the contents or effect thereof, or was misled concerning the provisions set forth therein.

Mason v. Burnett, 126 Wash. 498, 218 Pac. 255;

Johnston v. Spokane & Inland Empire R. Co., 104 Wash. 562, 177 Pac. 810;

Sherman v. Sweeney, 29 Wash. 321;

Hubenthal v. Spokane & Inland R. Co., 43 Wash. 677, 685, 86 Pac. 955.

As stated in the *Hubenthal* case last cited:

"'* * * it seems to us that parties must exercise ordinary business sense, and the faculties which are given to them for the purpose of transacting business; and that they cannot call upon the law to stand in loco parentis to them in the ordinary transactions of business, and their ordinary dealings with their fellowmen. * * * If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind.'

"The rule above announced has been reiterated in many subsequent cases. *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Sherman v. Sweeney*, 29 Wash. 321, 69 Pac.

1117; *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105; *Lake v. Churchill*, 39 Wash. 318, 81 Pac. 849; *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938. True, in nearly all of these cases the false representations related to the quality, quantity, or condition of property embraced in a contract of sale or deed, *but if a party cannot rely upon the representations of others as to such matters when the means of investigation are at hand, should not the rule apply with even greater strictness where an attempt is made to avoid the effect of a written contract which a party has signed, relying solely upon the representations of another as to its contents.*" (Italics ours)

In the Appendix we cite and quote from some of the other authorities which are in point.

Under the foregoing authorities and principles and under the allegations of the complaint, we submit that there was a complete failure to state a claim upon which relief can be granted because basic and essential elements of a fraud action were not alleged and it conclusively appears that there was no fraud.

II.

Apart from all other considerations, there is a failure to state a claim upon which relief can be granted because it conclusively appears from the allegations of the complaint, supplemented by the bill of particulars, that appellant's action is barred by the statute of limitations and by laches on the part of appellant.

The applicable statute of limitations is Remington's Revised Statutes of Washington, Section 159, subdivision 4, which provides that an action for relief upon the ground of fraud shall be commenced within

three years after the cause of action shall have accrued. Appellant concedes that this is the statute here applicable (Appellant's brief, p. 12).

It appears conclusively from the allegations of the complaint, as supplemented by the bill of particulars, that the alleged false and fraudulent representations were oral; that the latest year in which any of said representations was made is 1910; that plaintiff knew from time to time during the seventeen-year period beginning January 1, 1911 and ending December 31, 1927, the amount of the renewal commissions he was paid in accordance with the agency agreement of August 17, 1910 (Exhibit "C"), and also the amount of the Nylic payments he was paid in accordance with Nylic 2 (Exhibit "B"); that appellant received all of said Nylic payments ($56,498.95) prior to January 1, 1928, and received all of said renewal commissions ($52,171.54) prior to December 30, 1929; that throughout the period of seventeen years ending December 31, 1927, and since plaintiff at all times knew or could have computed the amounts which he might have received as renewal commissions if the agency agreement of January 1, 1908, were applicable during said period; that appellant's service as an agent of appellee terminated in 1936; and that this action was not commenced until February 14, 1944, more than 33 years after August 17, 1910, more than 16 years after December 31, 1927, and approximately 7½ years after August 22, 1936, the date of the severance of appellant's representation of appellee.

Under these facts, which appear conclusively from the allegations of the complaint as supplemented by the bill of particulars, it is the position of appellee

here, as it was in the District Court, that appellant's action is barred by the statute of limitations because it was not commenced within three years after the cause of action, if any, accrued and within three years after discovery by appellant of the facts constituting the alleged fraud.

This position of appellee is based upon and supported by principles and authorities which are universally recognized and established.

As stated in *Morgan v. Morgan*, 10 Wash. 99, 104, 38 Pac. 1054:

> "Under the weight of authority, the statute of limitations is not, now at least, generally regarded as an unconscionable defense. We regard this so well settled that we deem a citation of many authorities unnecessary, but refer to *Wood v. Carpenter*, 101 U.S. 135, where it is said:
>
> " 'Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. *While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary.* Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and the antidote go together'." (Italics ours)

Discovery of fraud is notice of the fraud. What is notice? The Supreme Court of Washington, in *Deering v. Holcomb*, 26 Wash. 588, 598, 67 Pac. 240, answers the question as follows:

> "This we can best answer in the language

adopted by the Supreme Court of the United States.

" 'Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.' * * * 'The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.' *Wood v. Carpenter*, 101 U. S. 135; *Martin v. Smith*, 1 Dill. 86; *Carr v. Hilton*, 1 Curt. 390; *Morgan v. Morgan, supra; Wickham v. Sprague*, 18 Wash. 466 (51 Pac. 1055); *Hect v. Slaney*, 72 Cal. 363 (14 Pac. 88); *Wright v. Davis*, 28 Neb. 479 (44 N.W. 490, 26 Am. St. Rep. 347); *Hawley v. Page*, 77 Iowa 239 (42 N.W. 193, 14 Am. St. Rep. 275).

"A party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the fact, which, if followed up diligently would lead to a discovery, is in law equivalent to discovery, — equivalent to knowledge. *Norris v. Haggin*, 28 Fed. 275."

See, also:

Irwin v. Holbrook, 32 Wash. 349, 355, 73 Pac. 260.

The presumption is that if the party affected by the alleged fraudulent transaction might with ordinary care and attention have successfully detected it, "he seasonably had actual knowledge of it." A general allegation of ignorance of the truth at one time and knowledge of it at another is of no effect. The follow-

ing language quoted from *Noyes v. Parsons*, 104 Wash. 594, 599, 177 Pac. 651, declares the rule here applicable and controlling:

> "* * * we have many times held that whatever is notice enough to excite attention and put a party upon his guard or call for an inquiry, is notice of everything to which such inquiry might have led. The presumption is that, if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.
>
> " 'A party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the fact, which, if followed up diligently would lead to a discovery, is in law equivalent to discovery — equivalent to knowledge.' *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561.
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> * * * * * * *
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> "The broad assertion that the statute does not run until the fraud is discovered is not tenable. The statute begins to run when the fraud should have been discovered, and a clue to the fact which, if followed up diligently, would lead to discovery, is in law equivalent to discovery. *Deering v. Holcomb, supra. A general allegation of ignorance at one time and knowledge at another is of no effect. Hardt v. Heidweyer*, 152 U.S. 547. *In order to excuse a want of knowledge of the fraud, a pleading must set forth what were the impediments to an earlier prosecution of the claim, how the pleader came to be so long ignorant of his rights, the means, if any, used by the opposing party fraudulently to keep him in ignorance, or how and when he first obtained knowl-*

edge of the matter alleged in the pleading. Pearsall v. Smith, 149 U.S. 231.

"The allegations contained in the complaint negative any excusable want of knowledge of any of the facts necessary to avoid the bar of the statute of limitations on the ground of fraud, and, on the other hand, demonstrate that all the substantive grounds of fraud were known at once, and any other fact necessary to have been known was not actively concealed, was not of a nature to conceal itself, and could have been known by the parties in interest by using ordinary diligence. This is sufficient to start the statute in question running, and justified the sustaining of the demurrer herein." (Italics ours)

In sustaining a demurrer to a complaint charging a lawyer with fraud in respect of his management of a client's estate, the Supreme Court of the State of Washington, in *Corliss v. Hartge*, 180 Wash. 685, 689, 42 P.(2d) 44, stated and applied the rule which is here controlling, namely:

"There are no facts alleged in the complaint which would call for an accounting on the part of Mrs. Hartge or Mr. Cadwallader. So far as these two respondents are concerned, we shall assume that the complaint seeks to state a cause against them for false and fraudulent representations, in reliance on which the appellant failed to present a claim. False representations, from the facts stated, upon which reliance is made, were uttered in the year 1927, and this action was not begun until May 14, 1934, a period of seven years having elapsed.

"Subdivision 4, of Rem. Rev. Stat., Sec. 159 (P.C. Sec. 8166), provides that, in actions for relief upon the ground of fraud, the cause of

action will not be deemed to have accrued until discovery by the aggrieved party of the facts constituting the fraud. Such actions must be begun within three years thereafter. The statute of limitations begins to run, not only from the discovery of the fraud, but also from the time when the fraud should have been discovered. Notice sufficient to excite attention and put a person on guard or to call for an inquiry is notice of everything to which such inquiry might lead.

"In *Tjosevig v. Butler*, *ante*, p. 151, 38 P.(2d) 1022, it is said:

" 'The statute of limitations begins to run, not only upon discovery of fraud, but also from the time when the fraud should have been discovered; and a clue to the facts, which, if diligently pursued, would lead to a discovery, is in law equivalent to discovery itself. Notice sufficient to excite attention and put a person on guard or to call for an inquiry is notice of everything to which such inquiry might have led'." (Citing authorities)

Again, in *Teeter v. Brown*, 130 Wash. 506, 509, 228 Pac. 291, the court announced and followed the doctrines here relied upon by the appellee, using the following language:

"* * * For fifteen or eighteen years the appellant sat idly by. Meanwhile some of the persons acquainted with the facts have died, and the great lapse of time has dimmed the memory of others. After fifteen years of inaction, he calls upon us. Such a voice does not stir the conscience of a court of chancery. Ordinarily, equity puts out its assisting arm only to those who have shown a disposition to help themselves.

The correct theory with reference to matters of this character was forcefully expressed by one of our deceased associates, in the case of *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060, as follows:

"'Where a case is purely of equitable cognizance, in the application of the doctrine of laches courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, ancient demands, and refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights. In such cases the statute of limitations does not necessarily govern the court in the application of the doctrine of laches. * * * Regard must be had to all of the facts and surrounding circumstances, and if, when carefully considered, they do not appeal to the conscience of the chancellor, on behalf of a claimant, the defense of laches should be allowed.'

* * * * * * * * * *

"A defrauded party must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. It could not have been difficult for the appellant to have ascertained that his property had been acquired by the respondent as his own, and so claimed and operated. Ordinary diligence on his part would have discovered this fact. With the strongest motives for action, he was supine. If there was fraud, he did nothing to unearth it."

In the recent case of *Henriod v. Henriod*, 198 Wash. 519, 525, 90 P.(2d) 222, the Washington Supreme Court clearly states and follows the principles here relied upon by the appellee, as is shown by the following quotation from the opinion:

"Appellant also contends that the trial court

erred in finding that whatever cause of action appellant had, if any, was barred by the statute of limitations, which began to run at a time when appellant had notice that Mr. Henriod had other property not disclosed by the property settlement agreement.

"The statute of limitations, Rem. Rev. Stat. §159 [P.C. §8166] subd. 4, reads:

" 'Within three years: * * *

" '4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud; * * *'

"We have consistently held that actions for relief on the ground of fraud premised upon Rem. Rev. Stat., §159, subd. 4, embrace only

" '* * * suits by parties to contracts who are asking to be relieved from contracts that they were fraudulently induced to make, as where a deed has been fraudulently obtained, and suits of that character where fraud is the substantive cause of the action.' *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054.

* * * * * * * * * *

"The case at bar is an action on the ground of fraud within Rem. Rev. Stat., §159, subd. 4, since the alleged fraud attended the execution of the contract and inhered in the contract itself. *Gustafson v. Cullen*, 155 Wash. 107, 283 Pac. 1087. In an action for relief on the ground of fraud, it is incumbent upon the aggrieved party to establish his inability to discern the perpetration of the fraud notwithstanding the exercise of reasonable diligence."

See also:

Matapan National Bank v. Seattle, 115 Wash. 596, 197 Pac. 789;

Hoy v. Burk, 92 Wash. 536, 159 Pac. 701;

Hawkins v. Button, 147 Wash. 246, 265 Pac. 479;

Reeves v. John Davis & Co., 164 Wash. 287, 2 P.(2d) 732.

The issue here is properly raised by a motion to dismiss. It is now definitely established that in any case where the legal effect of the bar of the statute of limitations conclusively appears, as it does here, from the allegations set forth in the complaint, as supplemented by the bill of particulars, the issue is properly raised by a motion to dismiss. Moreover, it is also definitely established that even though the action be treated as one in equity (which obviously the action here is not), the same result would follow in this particular case because of laches on the part of appellant.

On this point, as was hereinabove suggested, Rule 9(f) is considered by the courts to be of significance. It provides:

> "For the purpose of treating the sufficiency of a pleading, avertments of time and place are material and shall be considered like all other avertments of material matter."

The authorities sustaining this position are the following:

Barnhart v. Western Maryland Ry. Co., 41 F. Supp. 898, 904 (Dist. Court, D. Maryland—Nov. 19, 1941);

Hartford-Empire Co. v. Glenshaw Glass Co., 47 F. Supp. 711, 714 (Dist. Court, W. D. Penn.—July 16, 1942);

Wilson v. Shores-Mueller Co., 40 F. Supp. 729, 731 (Dist. Court, N. D. Iowa—Sept. 13, 1941);

Pearson v. O'Connor, 2 F.R.D. 521 (Dist. Court of United States—Dist. of Columbia—March 19, 1942);

Abram v. San Juaquin Cotton Oil Co., 46 F. Supp. 969, 974 (Dist. Court, S. D. California, Central Division—June 3, 1942);

Cramer v. Aluminum Cooking Utensil Co., 1 F.R.D. 741 (Dist. Court, W. D. Penn. —May 24, 1941).

Under the foregoing authorities it is submitted that it appears conclusively that appellant's action is barred by the statute of limitations because it was not commenced within three years after the cause of action, if any, accrued, and within three years after discovery by appellant of the facts constituting the alleged fraud.

There was no fiduciary relationship between appellant and appellee.

As before pointed out, it is alleged (Par. X, R. 26) that "the plaintiff reposed great confidence in the defendant and its methods of business and that a fiduciary relationship existed between the parties and that as a result of plaintiff's trust as to the manner of the operation of the defendant plaintiff did not discover that said representations as to the amount of his compensation were falsely and fraudulently made to

him and that plaintiff did not discover that such representations were false and fraudulent until within a period of at least a year from the date hereof."

It seems to be the position of appellant that these allegations are sufficient to excuse appellant's long delay in the commencement of this action, a delay of sixteen years or more after he knew, or by the exercise of ordinary diligence could have known, of the alleged fraud.

It is the position of appellee here, as it was in the District Court, that said allegations are not sufficient for such purpose and that it affirmatively appears that there was no fiduciary relationship between plaintiff and appellee.

As has been pointed out, under the alleged facts and the authorities to which attention has been directed a general allegation of ignorance at one time and knowledge at another is of no effect. In order to excuse want of knowledge of the alleged fraud the pleading must set forth "what were the impediments to an earlier prosecution of the claim, how the pleader came to be so long ignorant of his rights, the means, if any, used by the opposing party fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matter alleged in the pleading." The defrauded party must be diligent in making inquiry. It is incumbent upon him to allege and establish his inability to discern the perpetration of the fraud notwithstanding the exercise of reasonable diligence.

Here it seems obvious that the motion to dismiss

does not admit appellant's conclusion "that a fiduciary relationship existed between the parties."

In any event, the said allegations, relied upon by appellant, are not sufficient. There must, it is believed, be allegations of facts which if proved would establish a relationship between appellant and appellee which would constitute a fiduciary relationship within the definition thereof recognized by the courts.

To the contrary here it appears conclusively from the allegations of the complaint, as supplemented by the bill of particulars, that no fiduciary relationship which could be recognized as such by any court existed between appellant and appellee.

Appellant was an insurance agent, employed only as a soliciting agent. Obviously the relationship between appellant and appellee was nothing more than the normal and traditional relationship which exists between any principal and a soliciting agent in the life insurance business. There is no allegation that appellee ever acted or purported to act as an agent of appellant, or purported to represent or to act for or in behalf of appellant in any capacity. If any such charge were made, it could not be accepted as true. Appellant and appellee were dealing at arm's length and there is no allegation of fact to the contrary. Nor is there any charge that appellant was under a disability which imposed some unusual duty upon appellee to protect appellant. Nor is there any allegation of fact which could possibly indicate the existence of a relationship between appellant and appellee which impelled or induced appellant to relax the care and vigilance which he otherwise should and ordinarily

would exercise. The relationship was only a normal and traditional business relationship.

On principle, it is submitted, this position of appellee is sound. It is also sustained by the authorities.

In *Collins v. Nelson*, 193 Wash. 334, 345, 75 P.(2d) 570, the action was brought to recover for the loss of money paid by plaintiff on two promissory notes which were given in the purchase of certain mining stock which was placed in escrow with the defendant. The facts, as in most such circumstances, are extremely complicated. For present purposes it is enough to say that the plaintiff had had some further business transactions with the defendant; that there was testimony of a conversation between the parties at which defendant guaranteed to see that the stock was put up in escrow, and that in paying the notes plaintiff relied upon defendant's promise, and believed that the stock had been placed in escrow with the defendant as escrowee; that a copy of the escrow agreement, naming defendant as escrowee, was forwarded to the defendant; and that at the time of the payment of the notes defendant knew that the stock had not been placed in escrow as agreed.

Plaintiff contended that the action was for fraud and deceit. The theory was that a confidential relation existed between plaintiff and defendant, and that it was the duty of defendant, at the time plaintiff paid the notes, to inform plaintiff that the stock was not in defendant's possession, nor ready for delivery. In holding that no confidential relation existed, the court said:

"The court did not find, nor are we able to dis-

cover from the evidence, that there was any confidential relation existing between Nelson and Collins. It is true that there had been some social contact and friendly relations, as well as one prior business transaction between them, but there was no relation which, in law, could be said to be confidential. The social relations were casual, and the prior business deal involving the sale by the one and the purchase by the other of certain stock had been conducted at arm's length.

"To establish a fiduciary relationship upon the violation of which fraud is sought to be based, there must be something more than mere friendly relations or confidence in another's honesty and integrity. *There must be something in the particular circumstances which approximate a business agency, a professional relationship, or a family tie, something which itself impels or induces the trusting party to relax the care and vigilance which he otherwise should, and ordinarily would, exercise.*" (Underscoring supplied)

In *Cranwell v. Oglesby*, 12 N.E.(2d) 81, the Supreme Judicial Court of Massachusetts, quoting from one of its earlier decisions, states the fundamental requirement to be as follows:

" 'Mere respect for the judgment of another or trust in his character is not enough to constitute such a relation. There must be such circumstances as indicate a just foundation for a belief that in giving advice or presenting arguments one is acting not in his own behalf, but in the interests of the other party. If the relation is a business one, the existence of the mutual respect and confidence does not make it fiduciary.' "

In *Van Dale v. Prudential Ins. Co. of America*, 274 N. W. 153 (Wis. 1937), the action was initiated

by the plaintiff to recover disability benefits under four life insurance policies which had been issued to him by the defendant, notwithstanding the fact that plaintiff had theretofore, in consideration of the payment to him of the sum of $5,110.20 (disability payments for eighteen months), surrendered two of the policies for cancellation, and the other two policies for reissue with the disability clauses eliminated therefrom. The plaintiff alleged that the surrender of the policies was induced by fraudulent representations upon which he relied.

It so happened that plaintiff had also been a soliciting agent for the defendant company for some years, as a result of which it was contended that a confidential or fiduciary relationship existed between the plaintiff and the defendant. On this point the court said:

> "The trial court was of the opinion that a confidential or fiduciary relationship existed between the plaintiff and the defendant. We see no warrant for such a conclusion. True, the plaintiff had been in the employ of the defendant for a number of years, had been a valued employee, had enjoyed and received the approbation of his employer, and rightly had faith and confidence in the defendant company, but those facts did not create a fiduciary relationship, * * *."

Under the allegations relied upon by appellant and the foregoing authorities it is submitted that it conclusively appears that there was no fiduciary relationship between appellant and appellee.

Moreover, if it be assumed that a fiduciary relationship did exist at any time between appellant and

appellee, there is no allegation in the complaint of any fact from which it may reasonably be inferred that appellee was guilty of any act, either of commission or omission, which would be a violation of any duty owed by defendant to plaintiff, whatever the relationship may be considered to have been. To the contrary, it affirmatively appears that there was no fraud.

If there had been any fiduciary relationship between appellant and appellee, it terminated not later than August 22, 1936.

In addition, if it be assumed that at any time a fiduciary or any relationship other than a normal and traditional business relationship of principal and agent existed between appellant and appellee, it is obvious that in any event it could not toll the running of the statute of limitations after the date the relationship ceased to exist.

Here the alleged representations were made, according to appellant, in 1910. The period in respect of which the alleged representations would apply was the seventeen-year period ending December 31, 1927. Appellant did not serve as agent of appellee subsequent to August 22, 1936. It follows that all relationship between appellant and appellee terminated not later than August 22, 1936.

In the language of the court in *Davis v. Rogers*, 128 Wash. 231, 238, 222 Pac. 499:

> "It is to be remembered also that the fiduciary relation, if one existed, terminated with the transaction in 1911. * * * The case of *Irwin v. Holbrook, supra*, in which the statute of limitations was held to apply in an action between principal

> and agent, is strikingly similar to its facts to the facts of this case, and it was there held that the defrauded party was guilty of such negligence in not discovering the fraud for more than six years after the repudiation of the trust relation that he was held to have discovered it three years before the action was begun, and therefore the statute of limitations barred his recovery. We think, under the facts of this case, the same rule that applied in the *Irwin* case should be applied here, and the evidence strongly preponderating against the findings of the trial court, the judgment is reversed and the action dismissed."

It follows that from the allegations of the complaint, as supplemented by the bill of particulars, it conclusively appears that there was no fiduciary relationship between appellant and appellee and that if at any time there had been, it terminated not later than August 22, 1936.

Moreover, as heretofore pointed out, it also conclusively appears that the relationship between appellant and appellee was nothing more than the normal traditional contractual relationship which exists in the insurance business between any principal and the soliciting agent. Appellant was the agent of appellee. Appellee was not in any respect the agent of appellant.

III.

The points and authorities relied upon by appellant are not here applicable.

Appellant relies upon *Cole v. Utley*, 188 Wash. 667, 63 P.(2d) 473. It is obvious, we believe, that the case is not of aid to appellant.

There plaintiff was suing her brother to recover money alleged to have been fraudulently withheld by the brother who had acted as *her agent* in the sale (in 1907) of a timber claim. It appeared, "quite clearly, that, at the time she acquired the timber claim and long after the disposal of it, she placed full trust and confidence in her brother, relied upon him for advice in her business matters, and in the matter of the sale of the claim she constituted him her agent and accepted his statements as to facts without question. In all things relating thereto, she followed his directions fully. At his request, she executed a deed in blank and authorized him to fill in the name of the purchaser. The consideration named in the deed which she executed was one dollar" (188 Wash. pp. 669, 670).

Consequently, it there appears conclusively that a fiduciary relationship existed between the sister and her brother. The brother was the agent of the sister. Here there was no fiduciary relationship between appellant Moser and appellee, and appellee here was not in any capacity the agent or representative of appellant Moser.

In the *Utley* case the brother sold his sister's claim and represented to her that the amount he received for her claim was $5,000. He had in fact received more.

Consequently, his representation that he had received for her only $5,000 was a false representation of an existing fact. Here, there is no charge of a false representation of an existing fact and it conculsively appears that there was no misrepresentation of an existing fact.

In the *Utley* case there was "no hint of anything which would have put her (the sister) on notice," and the court held, properly we believe, that in the absence of anything to cause the question to arise in her mind "we cannot say that she was at fault in continuing to trust her brother as she did" (188 Wash. 670).

Here it conclusively appears that appellant knew in 1928 the amount which he had received from appellee as renewal commissions and Nylic payments during the 17-year period ending December 31, 1927. He knew, also, or should have known and could have then ascertained by computations of his own, the amount of the renewal commissions he would have received under the prior agency agreement if it had remained in force throughout said 17-year period. Consequently, in 1928 appellant Moser had actual knowledge or means of knowledge of all the material facts now relied upon by him as a basis for recovery in this action which was commenced in the year 1944.

In the *Utley* case the fiduciary relationship between plaintiff and her brother did not cease until the death of the brother, which occurred after the commencement of the litigation. Here, apart from the fact that there never was any fiduciary relationship between appellant Moser and the appellee, all relationship between them was severed in 1936.

Appellant cites *Larson v. McMillan*, 99 Wash. 626, 170 Pac. 324. There the fiduciary relationship between the parties was considered by the court to be that of husband and wife. In the language of the court: "Whatever their relations to others may have been, the principals in this unfortunate affair were not dealing at arm's length. They were conjugate; and their relations *inter sese* were as fiduciary as if the marriage had been a valid one. The trust of a wife is not to be swept away as a thistledown by a breath of suspicion. It is the policy of the law, for the good of society demands it, that trust and confidence between a husband and wife shall be sustained to the very limit" (99 Wash. 631, 632).

Obviously, in the instant case there is no analogous relationship between appellant Moser and appellee.

Appellant's charge (paragraph X) to the effect that the appellee kept all the books and accounts and made all payments of compensation that were due is here of no significance. There is no issue in respect of the accuracy of such accounting or in respect of payment of the full amount of the compensation that was due appellant under the agency agreement of August 17, 1910 (appellant's Exhibit "C") and Nylic Appellant accepts said accounting as correct. As to the hypothetical accounting in respect of the amount of compensation for renewals which appellant might have been entitled to receive if the prior agency agreement of January 1, 1908, had not been terminated, there is no charge that appellee at any time made and submitted to appellant a false or erroneous accounting or any accounting of such a speculative and hypo-

thetical character. Moreover, it appears conclusively, as heretofore pointed out, that at all times both prior and subsequent to January 1, 1928, appellant had at his command and in his possession all the available information necessary or required to enable appellant to ascertain for himself the aggregate amount of the hypothetical compensation which he here claims is the amount he would have received as renewal commissions if the prior agency agreement had not been terminated.

Appellant's suggestion (Brief 14) that whatever relationship existed between appellant and appellee continued subsequent to August, 1936, is not only contrary to the facts but is here of no significance. It is contrary to the facts because appellant's status as a Senior Nylic became fixed and final as of December 31, 1927. Appellant, having become a Senior Nylic, there was nothing further required of either appellant or appellee to continue that status and nothing that either of them could do to change it. There was and is nothing active about such a status. Since December 31, 1927, it has not been and it is not now an active relationship. The only incident arising from the fact that plaintiff became a Senior Nylic is that he receives monthly the Senior Nylic income provided in Nylic 2 (Exhibit "B," R. 62).

Appellant's Senior Nylic status, whatever may be the relationship by reason thereof between appellant and appellee, is of no significance because the issues here are in respect of alleged transactions which occurred prior to January 1, 1928, and prior to the date that plaintiff attained the status of a Senior Nylic.

The Senior Nylic relationship and Senior Nylic income of appellant are not here involved, either directly or indirectly.

It is submitted that under the allegations of the complaint, as supplemented by the bill of particulars and the authorities and principles here cited and discussed, and for the reasons herein set forth, appellee's motion to dismiss appellant's action was properly granted and the judgment of dismissal of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

As stated in *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 296:

> "A representation, to be actionable, must be made with the intention that it should be acted upon by the party to whom it is made, and it must be made under such circumstances as would justify a reasonably prudent man in relying upon it, and, generally speaking, where the means of knowledge is at hand and accessible, if the purchaser does not avail himself of these means, he cannot be heard to complain in a court of law that he was deceived by the seller's misrepresentations, or, as was said in *Washington Central Imp. Co. v. Newlands*, 11 Wash. 214 (39 Pac. 367):
>
> 'Parties must exercise ordinary business sense, and the faculties which are given to them for the purpose of transacting business; and that they cannot call upon the law to stand in *loco parentis* to them in the ordinary transactions of business and their ordinary dealings with their fellow men. * * * If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind'."

In *Andrews v. Standard Lumber Company*, 2 Wn. (2d) 294, 300, 97 P.(2d) 1062, the following statement of the court is in point:

> "Careful examination of the record fails to disclose that respondents introduced any direct evidence tending to prove that appellant's agent

had knowledge of the falsity, or was ignorant of the truth, of the representations attributed to him in regard to the Pabco plan. There was no evidence which even tended to show that the plan had not proven effective when followed by other builders.

"The record discloses that respondents relied upon the representations relating to appellant's oral guaranty to the effect that there would be no outstanding liens or encumbrances upon completion of the house. * * *

"In their final analysis, the statements attributed to appellant's agent amounted simply to an agreement that the Pabco plan would result in a completed building guaranteed by appellant not to exceed the cost of $3,700. *Appellant cannot be charged with fraud simply because that amount was exceeded.*" (Italics ours)

One rule here applicable is stated in *Penney v. Pederson*, 146 Wash. 31, 35, 261 Pac. 636:

"The second and principal question is, whether there was false representation as to the revenue which the various apartments were producing at the time the lease was entered into. Before signing the lease, the appellant was presented by the respondent Hans Pederson with a statement or list of the apartments, with a sum set opposite each which would indicate the rental value. The complaint, in this respect, is drawn upon the theory that Pederson, at the time, represented that the statement showed the rent which was then being received per month for the various apartments. The respondents contend that the representation was as to what the apartments would bring after the appellant had entered into possession and had furnished the same or some

of them. If the representation was to the effect that the apartments were then bringing the rental indicated by the statement and if this were untrue, it would furnish a basis for liability for fraud. *Hahn v. Brickell*, 135 Wash. 189, 237 Pac. 305; *Bliss v. Clebanck*, 136 Wash. 32, 238 Pac. 979. On the other hand, if the representation was what the apartments would bring after the appellant took possession, this would be only a matter of opinion and, if untrue, would not be actionable. *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, L.R.A. 1916B 1069; *Davis v. Masonic Protective Ass'n.*, 94 Wash. 406, 162 Pac. 516; *Community State Bank v. Day*, 126 Wash. 687, 219 Pac. 43.

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"The evidence being to the effect that the false representation was as to what the apartments would bring in the future, and not as to a then present fact, the trial court did not err in taking the case from the jury."

Again, in *Kirkland v. Dressel*, 104 Wash. 668, 673, 177 Pac. 643, one of the principles relied upon by defendant is stated and followed:

"The original representations as to the probability of bankruptcy proceedings if appellants' claims were insisted upon, and the suggestions or statements that there would be enough left to pay them after all other creditors were paid in full, were clearly expressions of opinion only, and that, too, upon subjects of which appellants had equal knowledge, and upon which their own judgment should have been as good as that of respondents. Clearly these statements or representations do not constitute actionable fraud."

In *Rankin v. Burnham*, 150 Wash. 615, 618, 274 Pac. 98, heretofore cited, the court states:

> "* * * a representation that something will be done in the future, or a promise to do it, from its nature cannot be true or false at the time when it is made. The failure to make it good is merely a breach of contract, which must be enforced by an action on the contract, if at all. And as in the case of promises, it is generally held that mere assertions of intention, or declarations of future purpose, do not amount to fraud."

In *Pigott v. Graham*, 48 Wash. 348, 351, 93 Pac. 435, in sustaining a demurrer to a complaint in an action based on fraud, the court stated:

> "Cases of this character are frequently hard to determine, for there are so many independent circumstances surrounding each case that it is difficult sometimes to discern the dividing line between that character of fraud and misrepresentation which justifies the purchaser in relying upon such representations, and those representations which are made where the parties are standing on a plane, where the facts which are the subject matter of the representations are ascertainable, and where it is the duty of the purchaser to put on foot such examination as is necessary to determine the facts concerning which the negotiations are made. But notwithstanding these different circumstances, there are certain basic principles upon which the cases must be adjudicated, and the difficulty is not so much to determine the law as to determine whether the particular circumstances bring the cases within the established rules of law. This court, in the case above referred to, said:
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> " 'We think the proper and sensible rule was

laid down by the United States supreme court in *Slaughter's Adm'r. v. Gerson*, 13 Wall. 379, where it was held that *the misrepresentation which would vitiate a contract of sale and prevent a court of equity from aiding its enforcement, must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge.'*

"That court, after announcing the rule as noted, further said, through Justice Field, who delivered the opinion of the court:

" 'A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to consideration when he complains that he has suffered from his own voluntary blindness and been misled by overconfidence in the statements of another.' *Slaughter's Adm'r. v. Gerson*, 13 Wall. 379, 20 L. ed. 627." (Italics ours)

In *Biel v. Tolsma*, 94 Wash. 104, 106, 161 Pac. 1047, the court states and follows one of the principles here applicable as follows:

"We have never held, and indeed no reputable court has held, that in dealing for property, real or personal, when the property was at hand and

the means of ascertaining its condition, its correspondence with the representations made concerning it by the seller, and its value, reasonably ascertainable, that a buyer could shut his eyes thereto, and blindly and recklessly rely upon any and all opinions or representations made concerning it by the seller. To establish such a rule would be to place a premium upon carelessness and indifference."